TAN SIEW PENG

v.

OCBC BANK (M) BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
ABU MANSOR ALI JCA
[CIVIL APPEAL NO: A-03-46-97]
20 MARCH 1998

CIVIL PROCEDURE: *Time - Extension of time - Application for - Sufficeincy of materials - Whether affidavit in support of application contains sufficient materials*

CIVIL PROCEDURE: *Appeal - Record of appeal - Time limit for filing - Whether date of notification by registrar important - Unavailability of sealed order appealed against - Whether consequential - Whether appellant should file record of appeal without sealed order and later include it in a supplementary record - Whether record of appeal must contain notes of proceedings and grounds of judgment*

The two applications herein before the instant court were made by the appellant; the first was for leave to file the record of appeal out of time; the second was for a stay of execution pending the appellant's appeal against the order of the High Court. In opposing the appellant's application for an extension of time to file the record of appeal, the respondent submitted that the appellant's affidavit filed in support of the application did not contain sufficient material upon which the court could exercise its discretion in favour of the appellant. The following points were averred in the appellant's affidavit in support: (i) the judge in chambers dismissed the appellant's appeal from the decision of the registrar on 12 July 1997; (ii) the appellant lodged his notice of appeal to the instant court on 23 July 1997; (iii) time for the appellant to file the record of appeal expired on 2 September 1997; and (iv) the appellant was unable to file the record of appeal because: (a) his solicitors were only notified by the registry of the instant court on 6 September 1997 that the notice of appeal had been received on 31 July 1997; and (b) his solicitors had not received a sealed copy of the order appealed against for inclusion in the record of appeal.

Held:
Per Gopal Sri Ram JCA

[1] There is no doubt that the court of Appeal has power, exercisable at its discretion, to extend the time limited for the filing or service of any document or the doing of any act under the Rules of the Court of Appeal 1994.

[2] It is trite that the burden is upon the applicant who seeks an extension of time to make available sufficient material upon which the court may exercise its discretion in his favour.

[2a] In the present case, there was insufficient material before the court to warrant the exercise of its discretion in favour of the appellant. The reasons advanced by the appellant in his affidavit in support were wholly inadequate.

[2b] The fact that the appellant's solicitors were notified on 6 September 1997 of the receipt of the notice of appeal on 31 July 1997 was irrelevant because it did not in any way deter the appellant from doing what was procedurally required of him to get his appeal off the ground in time.

[2c] It was also irrelevant that the sealed order was unavailable. It was always open to the appellant to file the record of appeal without the sealed order and later include it in a supplementary record. Such a practice is commonplace.

[2d] What was important was that the appellant should include the notes of proceedings and the grounds of judgment in the record of appeal. If these were not available within the time limited for filing the record of appeal, the appellant could obtain an extension of time from the registrar without having to formally move the instant court. However, if for any reason the appellant failed to act under the relevant practice direction, he could still apply to the instant court and obtain an extension of time pending his receipt of the notes of proceedings and the grounds of judgment from the High Court.

[Applications refused; appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Kedua-dua permohonan di hadapan mahkamah semasa di sini telah dibuat oleh perayu; yang pertama adalah bagi kebenaran untuk memfailkan rekod rayuan pada suatu masa yang dilanjutkan; yang kedua adalah untuk penggantungan perlaksanaan sementara menunggu rayuan perayu terhadap perintah Mahkamah Tinggi. Dalam menentang permohonan perayu untuk satu perlanjutan masa untuk memfailkan rekod rayuan, responden menyatakan bahawa afidavit perayu yang difailkan sebagai sokongan kepada permohonan tersebut tidak mengandungi bahan-bahan yang mencukupi bagi membolehkan Mahkamah mengalamkan budibicaranya secara memihak kepada perayu. Perkara-perkara yang berikut telah ditegaskan dalam afidavit perayu: (i) hakim dalam kamar menolak rayuan perayu melalui keputusan pendaftar pada 12 Julai 1997; (ii) perayu menyerah-simpan notis rayuannya kepada mahkamah semasa pada 23 Julai 1997; (iii) tempoh untuk perayu memfailkan rekod rayuan telah luput pada 2 September 1997; dan (iv) perayu telah tidak dapat memfailkan rekod rayuan kerana: (a) peguamcaranya hanya dimaklumkan oleh pendaftar mahkamah semasa pada 6 September 1977 bahawa notis rayuan tersebut telah diterima pada 31 Julai 1997; dan (b) peguamcaranya telah tidak menerima satu salinan sah perintah yang dirayu supaya disertakan dalam rekod rayuan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Tiada kesangsian bahawa mahkamah rayuan mempunyai kuasa untuk diamalkan atas budibicaranya untuk melanjutkan had masa bagi pemfailan atau penyampaian sebarang dokumen atau pelaksanaan sebarang akta di bawah Kaedah-Kaedah Mahkamah Rayuan 1994

[2] Adalah menjadi satu perkara biasa bahawa kewajipan adalah terletak pada pemohon yang meminta suatu perlanjutan masa untuk menyediakan bahan-bahan yang mencukupi yang membolehkan mahkamah mengamalkan budibicaranya secara memihak kepadanya.

[2a] Dalam kes semasa tersebut, telah timbul bahan-bahan yang tidak mencukupi bagi membolehkan mahkamah mengamalkan budibicaranya secara memihak kepada perayu. Alasan-alasan yang dikemukakan oleh perayu dalam afidavit sokongannya adalah keseluruhannya tidak mencukupi.

[2b] Hakikat bahawa peguamcara perayu telah dimaklumkan pada 6 September 1997 mengenai penerimaan notis rayuan pada 31 Julai 1997 adalah tidak relevan kerana ia tidak dalam apa cara sekalipun menghalang perayu dari melakukan apa yang dikehendaki darinya secara berprosedur untuk memulakan rayuan tepat pada masanya.

[2c] Adalah juga tidak relevan bahawa tidak terdapat perintah yang sah. Adalah dibolehkan kepada perayu pada setiap masa untuk memfailkan rekod rayuan tanpa perintah yang sah dan kemudian menyertakannya dalam rekod tambahan. Amalan sedemikian adalah satu perkara biasa.

[2d] Apa yang penting ialah bahawa perayu harus menyertakan nota-nota prosiding dan alasan-alasan penghakiman dalam rekod rayuan. Jika perkara-perkara ini tidak dapat disediakan dalam tempoh masa yang dihadkan untuk pemfailan, rekod rayuan, perayu boleh mendapatkan perlanjutan masa dari pendaftar tanpa perlu secara rasminya mengusul mahkamah semasa. Walaubagaimanapun, jika atas sebarang alasan perayu gagal bertindak di bawah petunjuk amalan yang relevan, beliau masih boleh memohon kepada mahkamah semasa dan mendapatkan perlanjutan masa sementara menunggu penerimaan nota-nota prosiding dan alasan-alasan penghakiman olehnya dari Mahkamah Tinggi.

[Permohonan ditolak; rayuan dibatalkan.]

For the appellant - Suhairi Sukur; M/s RJ Esa & Co
For the respondent - K Mohan (TM Eng with him); M/s Shook Lin & Bok

[Appeal from Bankruptcy Case No: 29-793-1994]

Reported by Alex KC Lee

JUDGMENT

Gopal Sri Ram JCA:

Two applications came before us. Both were by the appellant. Both were opposed by the respondent.

By the first the appellant sought leave of this court to file the record of appeal out of time. The second application asked for a stay of execution, pending appeal, of the order made by the High Court. We heard the application for extension of time first because upon its result depended the survival of the application for stay of execution.

In opposing the motion seeking an extension of time, counsel for the respondent submitted that the appellant's affidavit filed in support of the application did not set any, or any sufficient, material upon which this court could exercise its discretion in the appellant's favour.

A perusal of the appellant's affidavit reveals that the only points made in it are these:

(1) On 12 July 1997 the judge sitting in chambers dismissed an appeal from the registrar in the matter of the appellant's bankruptcy.

(2) On 23 July 1997, the appellant lodged notice of appeal to this court against the decision of the judge in chambers.

(3) The time limited for filing the record of appeal by the appellant expired on 2 September 1997.

(4) The appellant was unable to file the record of appeal because:

(a) the appellant's solicitors only received notification from the registry of this court on 6 September 1997 informing them that the notice of appeal which had been filed on 23 July 1997 had been received on 31 July 1997; and

(b) the appellant's solicitors had not received a sealed copy of the order appealed against for inclusion in the record of appeal.

After hearing argument, we came to the conclusion that the respondent's objection was well founded.

There is no doubt that this court has power, exercisable at its discretion, to extend the time limited for the filing or service of any document or the doing of any act under the Rules of the Court of Appeal 1994 ('the Rules'). And it is trite that the burden is upon an applicant who seeks an extension of time to make available sufficient material upon which this court may exercise discretion in his favour.

In the present case, we found ourselves in agreement with counsel for the respondent that there was insufficient material placed before us warranting the exercise of discretion in the appellant's favour. The reasons advanced by the appellant in his affidavit are wholly inadequate. Indeed, counsel for the appellant frankly conceded the point.

The fact that the appellant's solicitors learned on 6 September 1997 that their client's notice of appeal had been received on 31 July 1997 is of no relevance because it did not in any way deter the appellant from doing what was procedurally required of him. After all, the Rules as well as the relevant practice direction clearly set out the steps an appellant should take to get his appeal off the ground and the time frame within which he should act.

Equally irrelevant is the fact that the sealed order had not become available. It was always open for the appellant to file the appeal record without the sealed order and later include it in a supplementary record. Such a practice is commonplace in this court. What is of importance is that an appellant should include the notes of proceedings and the grounds of judgment in the record of appeal. Where these are not made available within the time limited for filing the appeal record, an appellant may, in accordance with the relevant practice direction, obtain an extension of time from the registrar without having to formally move this court. However, if for any reason the appellant fails to act under the practice direction, he may nevertheless apply to this court and obtain an extension of time pending his receipt from the High Court of the notes of proceedings and the grounds of judgment of the judge. In the present instance there is nothing to show when the appellant had applied to the learned judge of the High Court for the notes of proceedings and the grounds of judgment, although we were advised from the Bar by counsel for the appellant that these documents had been received some two weeks before the date on which we heard the motion. In the circumstances of the case the appellant had sufficient time to file and serve the appeal record before his application came on for hearing.

Accordingly, the application for extension of time was devoid of any merit. We therefore refused it and ordered the appellant to bear the costs of the application.

The motion to extend time having been dismissed, the appellant's application for a stay pending appeal became redundant. It was therefore dismissed.

Once the appellant's application for extension of time had been refused, it followed that there was no competent appeal before us. For completeness we therefore dismissed the appeal. Since counsel for the respondent did not ask for costs either upon the motion for stay or upon the appeal, we made no order as to costs in respect of these.

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